plain error formulation in ***United States v. Rodriguez***, 398 F.3d 1291 (11th Cir.), *cert. denied*, 125 S.Ct. 2935 (2005), that because "[n]othing in the record indicate[d] that the defendants' sentences would have been . . . [less] under an advisory Guideline scheme," even had the issue been timely raised, the defendants were entitled to no relief. App. 10 n.6. Finally, the court held that, because the increased sentence could be attributed to the correction of errors at the first sentencing, App. 11, and "the district court carefully considered each of the parties' objections, detailed the basis for its calculations, and explained the reasons the new sentences were longer than the original sentences," *id.* at 12, the defendants had failed to establish a violation of their due process rights for vindictive sentencing.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW, APPLYING THE ELEVENTH CIRCUIT'S FORMULATION OF PLAIN ERROR ANALYSIS IN DETERMINING PREJUDICE RESULTING FROM *BOOKER* ERROR, CONFLICTS WITH THE DECISIONS OF SEVERAL OTHER UNITED STATES COURTS OF APPEALS ON THIS IMPORTANT MATTER AFFECTING THOUSANDS OF DEFENDANTS NATIONWIDE. REVIEW SHOULD BE GRANTED TO ESTABLISH UNIFORMITY AMONG THE CIRCUIT COURTS, EQUALITY BETWEEN SIMILARLY SITUATED DEFENDANTS, AND BASIC JUSTICE IN SENTENCING FOR THESE DEFENDANTS.

One of this Court's chief roles is to ensure decisional uniformity on important issues of law among the lower

federal courts. *See* ***Wright v. North Carolina***, 415 U.S. 936 (1974) (Douglas, J., dissenting from denial of *cert.*) (quoting legislative history underlying 1925 reform of Supreme Court's jurisdiction to ensure "efficient [ ] functioning in the performance of its highest duty of interpreting the Constitution and preserving uniformity of decision by the intermediate courts of appeals"). Uniformity is essential to promote the appearance of fairness and integrity and to encourage the trust and faith of the people these institutions govern. It is further this Court's duty to ensure the equal and fair administration of criminal justice in the federal courts. Fulfilling these responsibilities necessitates review of the decision below.

The Ramoses' sentences were determined based on facts neither pled in their indictment nor found by a jury. Instead, these sentences, far in excess of any directly supported by the jury's verdicts, were based on findings of the district judge. Indeed, as a result of these findings leading to Sentencing Guidelines ranges exceeding the statutory maximums of the Ramoses' offenses of conviction, the district court was required to impose the statutory maximum sentences. U.S.S.G. § 5G1.1(a). This procedure, and the mandatory imposition of the statutory maximum sentences, violated the Ramoses' Sixth Amendment right to trial by jury as recognized in ***Booker***.

The Ramoses, who were sentenced before this Court's decision in ***Booker***, failed to object to their judge-found-fact-based sentences in the district court. They attempted to raise this objection at their first opportunity after issuance of ***Booker***, by moving to file supplemental briefs while their appeals from their resentencings were pending. But the Eleventh Circuit, employing its rule prohibiting litigants from raising new issues after filing their

opening briefs, even ones based on intervening caselaw, blocked these efforts. App. 6-7 n.6, 14-15. Then, employing its approach for assessing plain ***Booker*** error conceived in ***United States v. Rodriguez***, 398 F.3d 1291 (11th Cir.), *cert. denied*, 125 S.Ct. 2935 (2005), the court concluded that because "[n]othing in the record indicates that the defendants' sentences would have been different under an advisory Guidelines scheme," the defendants were entitled to no relief. App. 10 n.6.

In the wake of this Court's decision in ***United States v. Booker***, 125 S.Ct. 738 (2005), a deep-multi-circuit conflict has arisen regarding the proper analysis for plain ***Booker*** error. This conflict affects thousands of defendants who were sentenced under the scheme this Court declared unconstitutional but who did not preserve this issue in the district court because this Court's decision in ***Booker*** post-dated their sentencings.

The decision below exemplifies the Eleventh Circuit's approach espoused in ***Rodriguez***. There, the court held, in seeming conformity with all of the other circuit courts of appeals, that sentencing a defendant whose appeal was pending at the time ***Booker*** was decided under the Guidelines as a mandatory sentencing scheme constituted "error" that was "plain." *Id.* at 1298-9. Regarding whether such error "affected substantial rights," *see* ***United States v. Olano***, 507 U.S. 725, 734-5 (1993), the court held that the determination of this issue turned on the assignment of the burden to the defendant. ***Rodriguez*** at 1299-1301. The court framed the issue as "whether there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge in this case." *Id.* at 1301. The court observed that, where "[t]he record provides no reason to

believe any result is more likely than the other," "[t]he obvious answer is that we don't know." *Id.* Because, under these circumstances, a defendant is unable to carry his burden, the plain error test is not satisfied and the defendant is entitled to no relief.[2]

The ***Rodriguez*** approach is one of three that have developed among the circuit courts of appeals. The other courts that have adopted this approach include the First, Fifth, and Eighth Circuit Courts of Appeals. *See* ***United States v. Antonakopoulos***, 399 F.3d 68, 80 (1st Cir. 2005); ***United States v. Mares***, 402 F.3d 511, 521-2 (5th Cir.), *pet. for cert. filed*, No. 04-9517 (Mar. 31, 2005); ***United States v. Pirani***, 406 F.3d 543, 552 (8th Cir. 2005) (*en banc*). This approach ensures, except in rare circumstances, that a defendant whose appeal was pending at the time ***Booker*** was decided and who was sentenced under the constitutionally defunct mandatory Sentencing Guidelines can obtain no sentencing relief for this error.[3]

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[2] While ***Rodriguez*** was pending review in this Court, the Eleventh Circuit, *sua sponte*, considered and denied rehearing *en banc*. ***United States v. Rodriguez***, 406 F.3d 1261 (11th Cir. 2005). Judge Carnes' lead opinion amplifies the views expressed in the panel opinion. *Id.* at 1262-1281. Judges Tjoflat and Barkett filed separate dissenting opinions criticizing the Eleventh Circuit's approach to plain ***Booker*** error analysis. *Id.* at 1281-1304.

[3] Of course, these courts also apply this approach where defendants, like the Ramoses, are sentenced to statutory maximums because the Sentencing Guidelines ranges, based on the judicially found sentencing facts, exceed those maximums. *See, e.g.*, ***United States v. Gollhofer***, No. 04-2363, 2005 WL 1431497 (8th Cir. June 21, 2005); ***United States v. Jakoubek***, 411 F.3d 951 (8th Cir. 2005); ***United States v. Dowling***, 403 F.3d 1242, 1244-8 & n.7 (11th Cir. 2005).

A second approach is exemplified by the Fourth Circuit's opinion in ***United States v. Hughs***, 401 F.3d 540 (4th Cir. 2005). There, the court looked to this Court's decision in ***Kotteakos v. United States***, 328 U.S. 750 (1946), to assist in framing the question to be answered in determining the third prong of plain error analysis. Based on ***Kotteakos***, the court observed that "the reviewing court must consider 'what effect the error had or reasonably may be taken to have had upon' the outcome of the proceedings." *Id.* at 548. Thus, it framed the question as "whether [the defendant] has established that the sentence imposed by the district court as a result of the Sixth Amendment violation 'was longer than that to which he would otherwise be subject.'" *Id.* As the Ninth Circuit more recently restated, "prejudice is determined by comparing the sentence that the defendant could have received based solely on the jury's verdict (or on facts otherwise admitted by defendant) with the sentence that he actually received. If the former sentence would have been more favorable to the defendant, the defendant was prejudiced." ***United States v. Ameline***, 409 F.3d 1073, 1081 (9th Cir. 2005) (*en banc*). Thus, in ***Hughs***, because the maximum sentence permitted by the jury verdict (and other facts admitted by the defendant) was 12 months, less than the 46 month sentence imposed by the district court under the mandatory Guidelines, the defendant satisfied the prejudice prong. *Id.* at 548-9. This approach also is followed by the Third and Sixth Circuits. *See, e.g.*, ***United States v. Davis***, 407 F.3d 162, 165 (3rd Cir. 2005) (denying petition for rehearing *en banc*); ***United States v. Oliver***, 397 F.3d 369, 379-80 (6th Cir. 2005).

A final approach is exemplified by the Ninth Circuit's recent *en banc* decision in ***United States v. Ameline***, 409

F.3d 1073 (9th Cir. 2005). There, after easily concluding that sentencing defendants under the previously mandatory Sentencing Guidelines was error and plain, *id.* at 1078, the court turned to the "more vexing inquiry [that] lays in the third prong of the plain error test: whether the error affected [the defendant]'s substantial rights, that is, whether the outcome of [the defendant]'s sentencing was affected by the erroneous enhancement of [his] sentence on the basis of judge-made findings in the mandatory guidelines regime." *Id.* Joining the Second, Seventh, and D.C. Circuits, *see, e.g.*, ***United States v. Crosby***, 397 F.3d 103, 120 (2nd Cir. 2005); ***United States v. Paladino***, 401 F.3d 471, 483-4 (7th Cir.), *pet. for cert. filed*, No. 04-10402 (May 26, 2005); ***United States v. Coles***, 403 F.3d 764, 769-71 (D.C. Cir. 2005), the court held that where the record fails to provide any inkling of how the district court would have proceeded had it known that the Guidelines were advisory rather than mandatory, the proper approach is to remand to the district court for a determination of that very issue. *Id.* at 1078-80. In support of this procedure, the court observed that this was the most accurate procedure for resolving this question. *Id.* at 1082. The court further noted, the sentencing judge is the only person who knows the answer to the determinative question. *Id.* at 1079. This approach avoided the risk of "affirm[ing] a sentence that was unconstitutional and may have been prejudicial. . . . " *Id.* Quoting from ***Paladino***, the court stated "[t]his is '[t]he only practical way (and it happens also to be the shortest, the easiest, and the surest way) to determine whether' there was prejudice." *Id.*[4]

[4] In ***Crosby***, as in the instant case, the sentencing range derived from the guidelines calculation exceeded the statutory maximum. *Id.* at

(Continued on following page)

Allowing this conflict to persist results in the unseemly predicament of justice being delivered differently in different circuits. The court below affirmed the defendants' sentences, notwithstanding the unconstitutionality of the Guidelines' scheme under which they were sentenced, because absent any indication in the record that their sentences would have been different under an advisory guideline scheme, it was unable to establish that the defendants' rights had been prejudiced. But, under the plain error analysis extant in the Third, Fourth, and Sixth Circuits, the defendants' sentences would have been vacated and their cases remanded for resentencing. Based on the remaining valid jury verdicts following the defendants' first appeal finding them guilty of conspiracy to commit involuntary servitude (count 1) and illegal alien harboring (count 4), absent the district judge's judicial fact-finding, these verdicts carried a grouped adjusted offense level of 24.[5] The adjusted offense level of 24 would

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106. Although the sentencing range was 188 to 235 months, the defendant was sentenced to 10 years. Nonetheless, Crosby's case was remanded to the district court to determine, had the district court known that the guidelines were advisory rather than mandatory, would it have sentenced Crosby to something less. *Accord* ***United States v. Montgomery***, No. 03-4286, 2005 WL 1274469 at *2 (4th Cir. 2005) (unpublished); ***United States v. Selioutsky***, 409 F.3d 114, 119-20 (2nd Cir. 2005).

[5] Without the district court's findings that the defendants harbored 100 or more aliens, brandished a firearm, and caused a permanent or life threatening injury, the base offense level of 22 for conspiracy to commit involuntary servitude, U.S.S.G. § 2H4.1(a)(1), would have been the greater offense level as between it and the offense level of alien harboring in count 4. *See* U.S.S.G. § 2L1.1(a)(2). Increasing the base offense of 22 by two based on the commission of another felony offense during or in connection with the involuntary servitude would have resulted in an adjusted offense level of 24. The jury's verdict would not

(Continued on following page)

have carried a sentencing range in Criminal History Category I of 51 to 63 months, well below the 180 months to which the defendants were sentenced.

Similarly, had the defendants been convicted in the Second, Seventh, Ninth, or D.C. Circuits, their sentences would have been remanded to the district court for a determination of whether, had it known the Guidelines were advisory rather than mandatory, it would have sentenced them to something less. The decision to deny the defendants this opportunity should not be based on the fortuity of the identity of the circuit in which the defendants were convicted and sentenced.

Allowing this conflict to persist also undermines the goal of ensuring equality among similarly situated defendants. Ironically, the achievement of this goal was the primary objective of the Sentencing Guidelines. *See, e.g.*, ***Koon v. United States***, 518 U.S. 81, 113 (1996); ***Mistretta v. United States***, 488 U.S. 361 (1989) (discussing problems with indeterminate sentencing system that led to adoption of Sentencing Guidelines); 28 U.S.C. § 991(b). But, as recognized by several courts, the approach of the Eleventh Circuit, as well as that of the First, Fifth, and Eighth Circuits, virtually ensures inequality. *See, e.g.*, ***Ameline***, 409 F.3d at 1080-1 (Eleventh Circuit approach, leaving determination of whether a defendant is entitled to resentencing to vagaries of what judge may have said at sentencing, "undermine[s] the fairness, integrity and reputation of the judicial proceedings"). This approach allows a defendant's result on appeal to be determined by

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have supported the four level increase for manager or organizer or the two level increase for Ramiro based on obstruction of justice.

what the district judge may or may not have said at the time of sentencing. If the judge happens to indicate a disagreement with the Guidelines and tells the defendant that the judge's "hands are tied," the defendant, presumably, would be able to carry his burden of establishing that the plain error affected substantial rights. But, in another case, if a judge with similar views gives no indication of how he might have sentenced the defendant had the Guidelines been advisory, the defendant would lose his appeal. Thus, two identically situated defendants, one sentenced by a judge vocal about his disagreement with the mandatory nature of the Guidelines, and another who believed the same but "felt constrained quietly to follow the law," ***Ameline***, 409 F.3d at 1105 (Wardlaw, J., concurring in part and dissenting in part), would receive entirely different results on appeal. "[I]t would be most unfair and unreasonable for us to ground our prejudice analysis on the fortuity of whether a defendant was sentenced by a particular sentencing judge who openly criticized the Guidelines or indicated that they were unduly harsh as applied to a particular defendant rather than one who felt constrained quietly to follow the law." *Id.*

Allowing this conflict to persist also denies justice to individual defendants. As the majority opinion in ***Ameline*** highlights, the only way definitively to determine whether a district court would have sentenced the defendant differently had the judge believed the guidelines were advisory is to ask the sentencing judge. *Id.* at 1079, 1105. This avoids the substantial risk of "leaving in place an error infected sentence. . . . " ***United States v. Williams***, 399 F.3d 450, 461 (2nd Cir. 2005). Absent the constraints of the mandatory Guidelines, defendants would be free, for instance, to show their original sentencing judges that

there were mitigating factors that the judge initially was prohibited from considering that now, under an advisory system, might well have been persuasive in leading to a reduced sentence. *See, e.g.*, ***United States v. Jackson***, 408 F.3d 301, 304 (6th Cir. 2005) (although a district court's reliance upon discouraged or prohibited factors to support a downward departure would have been problematic prior to ***Booker***, such a departure now may be reasonable under the discretionary guidelines); ***United States v. Ameline***, 400 F.3d 646, 655-6 (9th Cir. 2005) (section 5K2.0(d), identifying prohibited bases for downward departures, no longer constrains a district court's discretion). Similarly, cooperation with law enforcement that previously, in the government's view, may not have earned the filing of a 5K1.1 motion, now may be found by the district judge to be a deserving basis for a sentence reduction.

It is antithetical to constitutional principles of fairness and equality to have different rules of law in different circuits that result in some defendants sentenced under an unconstitutional sentencing scheme obtaining relief, and others being denied relief. It is contrary to the rules of fundamental justice to allow a defendant fortunate enough to be sentenced by a judge who expressed dismay with an unduly harsh Guidelines sentence to obtain relief, but to deny relief to a defendant sentenced by a judge harboring an identical belief but who failed to express it. The cost of tolerating a rule that risks leaving in place a constitutionally defective sentence that may have prejudiced the defendant, when a mechanism exists to determine with near certainty and relative ease whether the defendant was prejudiced by the unconstitutionally conceived sentence, is too great.

It is not an answer to simply tolerate this inequality because it will operate for only a discrete period of time until all of the appeals of defendants sentenced under the constitutionally defective mandatory Guidelines have been exhausted. This unfairness will affect thousands of defendants. More importantly, it will erode the trust and confidence of this nation in federal courts as institutions that deliver justice fairly and with equality.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS ABANDONED THIS COURT'S RULES FOR ENSURING AGAINST VINDICTIVE SENTENCING SET FORTH IN *NORTH CAROLINA v. PEARCE*, AS MODIFIED IN *ALABAMA v. SMITH*. ITS OPINION CONFLICTS WITH THOSE OF OTHER CIRCUIT COURTS OF APPEALS.

Although the defendants had three of four counts of conviction vacated on their first appeal, they were resentenced to 180 months in prison, 33 more months than the 147 month sentence they received at their first sentencing. To elevate the defendants' offense level so as to necessitate a sentence at the statutory maximum, the district court applied obstruction-of-justice and leadership-role enhancements not applied at the first sentencing. It applied a new cross reference that resulted in other significant enhancements.

In addressing the defendants' vindictive sentencing claim, the Eleventh Circuit abandoned this Court's formula for determining whether a "presumption of vindictiveness" arose. It uncritically accepted the district court's

blatantly erroneous calculation of the Sentencing Guidelines at the first sentencing, and its approval of new and significant enhancements at the resentencing, as "objective reasons" for the increased sentence. Ultimately, the court turned a blind eye to the tell-tale signs of vindictiveness. The opinion conflicts with others that have dutifully applied ***Pearce's*** rules.

An essential component of constitutional due process is "that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a . . . [remand]." ***North Carolina v. Pearce***, 395 U.S. 711, 725 (1969). "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort. . . . " ***Bordenkircher v. Hayes***, 433 U.S. 357, 363 (1977). Due process also "requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." ***Pearce***, 395 U.S. at 725 (footnote omitted). Otherwise, the defendant will be chilled in the exercise of his right to challenge a conviction or sentence. *Id.*

In ***Pearce***, recognizing that the "existence of a retaliatory motivation would . . . be extremely difficult to prove in any individual case," *id.* at 725 n.20, 726, this Court held that vindictiveness is presumed "whenever a judge imposes a more severe sentence upon a defendant after a . . . remand[,]" and the reasons for the enhancement do not "affirmatively appear." *Id.* Subsequently, in ***Alabama v. Smith***, 490 U.S. 794 (1989), this Court limited applicability of the ***Pearce*** presumption to cases "in which there is a 'reasonable likelihood' that the increase in sentence is the product of actual vindictiveness on the part of the

sentencing authority." *Id.* at 799 (quoting ***United States v. Goodwin***, 457 U.S. 368, 373 (1982)).

In ***Smith***, this Court noted that ***Pearce's*** presumption of vindictiveness does not apply in every case where a convicted defendant receives a higher sentence on re[mand]." *Id.* at 799 (quoting ***Texas v. McCullough***, 475 U.S. 134, 138 (1986)). It held that a district judge's harsher sentence following trial after the defendant successfully challenged his guilty plea on appeal did not give rise to a presumption of vindictiveness. This Court noted that a judge sentencing a defendant on a fuller record provided "enough justifications for a heavier second sentence that it cannot be said to be more likely than not that a judge who imposes one is motivated by vindictiveness." *Id.* at 802.

In ***Nulph v. Cook***, 333 F.3d 1052 (9th Cir. 2003), the court applied the presumption of vindictiveness on its way to reversing the denial of the petitioner's habeas corpus petition based on vindictive sentencing. The petitioner, sentenced by an Oregon state court to an indeterminate sentence of 75 to 155 years, came before the Oregon State Board of Parole to review the judicially imposed minimum sentence. *Id.* at 1054. The Board overrode the sentence and, employing a new matrix-range method, set a release eligibility date following a term of 360 months imprisonment. *Id.* Explaining its decision, the Board stated "the [judicially imposed] minimum terms [were] not an appropriate penalty for the offense" and were "not necessary to protect the public." *Id.* It further stated that it believed the judicially set minimums were "excessive" and that the minimum sentence it imposed was "an appropriate sanction." *Id.* at 1054-5.

The petitioner sought and obtained habeas corpus relief based on the impermissible retrospective application of the Board's new method for determining release eligibility. *Id.* at 1055. Upon his return to the Board, upon being asked if he wanted his sentence, "all or nothing," to be considered under the "former rules," petitioner responded affirmatively. Following its deliberations, the Board reset the petitioner's term of imprisonment to 900 months. It explained that this term was "an appropriate sanction for the criminal conduct" and "necessary for the protection of the public." *Id.*

Ultimately, concluding that ***Pearce's*** presumption of vindictiveness applied, the Ninth Circuit pointed to the significantly harsher sentence imposed by the Board following remand from petitioner's successful challenge to the Board's new matrix-range method. It concluded that the Board's reasons for increasing the petitioner's sentence did not "affirmatively appear." *Id.* at 1058. In response to a dissenting judge's assertion that the record demonstrated that the sentence increase was based on the petitioner's election of an all or nothing rule, the majority maintained that there was insufficient evidence that petitioner elected this approach. *Id.* at 1058. The majority noted that it could not "blindly accept the Board's proffered reasons." *Id.*

Even closer to the instant case, in ***United States v. Jackson***, 181 F.3d 740 (6th Cir. 1999), the court also applied ***Pearce's*** presumption of vindictiveness in reversing the defendant's resentencing upon remand. After being convicted of a drug-related offense, the defendant, in Criminal History Category II, received a sentence of 262 months imprisonment, low end of the 262 to 327 month range. *Id.* at 742. After claiming numerous sentencing errors on appeal, the defendant's sentence was vacated on

an improper attribution to him of a particular instance of drug trafficking and quantity of drugs. *Id.* at 742-3. On remand, a revised PSI uncovered an additional prior conviction boosting the defendant into Criminal History Category III. The defendant objected to his criminal history increase. The district court overruled the defendant's objection. Although the district court now held the defendant responsible for a significantly lesser quantity of drugs, it sentenced him to 292 months, near the upper end of the applicable 235 to 293 month sentencing range. *Id.*

Concluding that ***Pearce's*** presumption of vindictiveness applied, the court pointed to the 30 month higher sentence on remand and the sentence at the high end of the newly calculated sentencing range. *Id.* at 744-5. The court rejected any notion that the upward revision in the defendant's criminal history category, the legitimate sentence within the applicable sentencing range, or the district judge's explanation for the specific sentence within the applicable range, including the defendant's "scofflaw attitude, reflected in his criminal history score, which militates against any reasonable expectation of rehabilitation as a result of a shorter sentence," *id.* at 745, negated a "reasonable likelihood" that the increased sentence was the product of actual vindictiveness.

In conflict with ***Nulph*** and ***Jackson***, the court below failed to apply ***Pearce's*** presumption of vindictiveness under circumstances in which there was a "reasonable likelihood" that the increase in the defendants' sentences was the product of actual vindictiveness. On resentencing, the district judge sentenced the defendants to terms of imprisonment 33 months longer than the first time around, 180 months compared to 147 months. This followed an appeal in which the defendants challenged

evidentiary and prosecutorial misconduct rulings of the district court.

By the time the case returned to the district court, the counts of conviction had been substantially pared down – two counts had been eliminated as well one of three bases for the conspiracy count. The district court now made numerous factual findings and legal rulings substantially increasing the defendants' offense level, from 26 at the first sentencing, to 37 and 39 for Juan and Ramiro, respectively, at the resentencing.

The Eleventh Circuit worked the numbers hard in an effort to negate a justifiable presumption of vindictiveness. Although claiming not to excuse the district judge's apparent acquiescence in the probation officer's gross miscalculation of the applicable guidelines at the first sentencing, the court was, nonetheless, content to rely on this as a legitimate reason for the increase. App. 11. The court justified the district court's application of obstruction-of-justice and leadership-role enhancements at the resentencing but not at the original sentencing based on the fact that the government's attempt to make these objections at the original sentencing were ignored as untimely. App. 12 n.8. But, the district judge sat through the lengthy trial before the original sentencing at which all of the evidence regarding the Ramos brothers' putative organizer or leader roles was elicited. Likewise, although at the first sentencing, the probation officer misguided the district judge to cross-reference the involuntary servitude related conviction in count 1 to the extortion offense in count 2 (instead of the harboring illegal aliens offense in count 4), the district court had all of the information necessary to identify the correct cross-reference at the original sentencing. Similarly, the specific offense characteristics upon

which the court relied to enhance the defendants' offense levels at resentencing, and the evidence purportedly supporting those enhancements, were all known and available at the original sentencing. The most reasonable inference is, based on compassion, lenience, or otherwise, the district court determined not to apply these enhancements at the original sentencing. The district judge's decision to make these additional findings after the defendants appealed his rulings and successfully won a vacation of convictions and remand for resentencing raised, at least, a presumption of vindictiveness under ***Pearce*** and ***Smith***.[6]

The court below incorrectly applied this Court's rules governing due process in the context of vindictive sentencing set forth in ***Pearce*** and ***Smith***. Its analysis conflicts with the opinions of the Ninth Circuit in ***Nulph*** and Sixth Circuit in ***Jackson***. To reset the Eleventh Circuit's path on the course which this Court has followed for more than 30 years, and to preserve the fundamental due process

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[6] The Eleventh Circuit seemed to suggest that the defendants were not prejudiced by any vindictiveness in calculating the Sentencing Guidelines because they received sentences below the Guidelines range. App. 12 n.8. However, increases of 11 offense levels for Juan (26 to 37) and 13 offense levels for Ramiro (26 to 39) were implicated by the district court's "new" Guidelines calculations on resentencing. App. 28-29. Even were the four level increase for organizer or leader role the only assessment for which a presumption of vindictiveness attached, absent this enhancement, for instance Juan Ramos' offense level would have dropped to 33 carrying a sentencing range of 135 to 168 months, less than the sentence ultimately imposed by the district court judge. Clearly, both defendants were prejudiced by the district court's presumptively vindictive resentencing.

values at stake in this important context, this Court should review the Eleventh Circuit's decision.

CONCLUSION

For these reasons, Petitioners respectfully pray that this Court grant its Writ of Certiorari.

Respectfully submitted,

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No. _____

In The
Supreme Court of the United States

RAMIRO RAMOS and
JUAN RAMOS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

Page

Decision of Eleventh Circuit Court of Appeals, ***United States v. Ramiro Ramos, et al.***, Nos. 04-11152 & 04-12923 (May 5, 2005) .....App. 1

Order Denying Ramiro Ramos' Motion to File Supplemental Brief (Feb. 14, 2005) .....App. 14

Decision of Eleventh Circuit Court of Appeals, ***United States v. Ramiro Ramos, et al.***, No. 02-16478 (Sept. 26, 2003).....App. 16

Chart prepared by government and filed with its Record Excerpts in ***United States v. Juan Ramos***, No. 04-12923, comparing first sentencing and resentencing .....App. 29

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-11152
Non-Argument Calendar

D.C. Docket No. 01-14019-CR-KMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAMIRO RAMOS,
a.k.a. "EL CHAGAN," etc.,
d.b.a. "R&A HARVESTING,"

Defendant-Appellant.

No. 04-12923

D.C. Docket No. 01-14019-CR-KMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN RAMOS,
a.k.a. NENO, etc.,
d.b.a. R&A HARVESTING, etc.,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(May 5, 2005)

Before CARNES, HULL and MARCUS, Circuit Judges.

PER CURIAM:

This is the second time this case has been before this Court. In the first appeal, this Court vacated two of the four convictions of defendants Ramiro Ramos and Juan Ramos and vacated their 147-month sentences. On remand, the district court sentenced both defendants to 60 months' imprisonment on count 1 and 120 months' imprisonment on count 4. In this appeal, the defendants challenge their new sentences. After review, we affirm.

I. BACKGROUND

A. Trial Evidence

The defendants are brothers who used threats to prevent migrant workers from leaving their employment, housed the migrant workers in abysmal conditions, kept the migrant workers under surveillance, and kept the migrant workers in debt for the duration of the harvesting season. Further, the defendants assaulted Jose Martinez, the owner of a transportation service for migrant farm workers, with the intent of inducing Martinez not to transport migrant farm workers out of Lake Placid, Florida.

At the defendants' trial, Martinez and Alejandro Benitez, an employee of Martinez, testified about the

assault. Further, three migrant workers testified as to their living conditions.

On June 26, 2002, a jury convicted both defendants of: conspiracy to violate the laws of the United States by keeping migrant workers in involuntary servitude, in violation of 18 U.S.C. § 371 (count 1); interference with commerce through extortion by threats or violence, in violation of 18 U.S.C. §§ 1951 and 2 (count 2); use of a firearm during a crime of violence, in violation of 18 U.S.C. §§ 924 and 2 (count 3); and harboring illegal aliens from January 1, 2000, to June 20, 2001, in violation of 8 U.S.C. § 1324 and 18 U.S.C. § 2 (count 4).

B. The First Sentencing and Appeal

After the trial, the district court sentenced both defendants to three concurrent 63-month terms of imprisonment on counts 1, 2, and 4, and to a consecutive 84-month sentence as to count 3, for a total of 147 months' imprisonment.

In their first appeal, the defendants raised several challenges to their convictions and sentences. Specifically, the defendants argued that: (1) their convictions for offenses based on extortion were invalid under *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 123 S. Ct. 1057 (2003) because they did not obtain any property during the commission of their offenses;[1] (2) the prosecutor engaged in misconduct during its opening

[1] In *Scheidler*, the Supreme Court held that extortion under 18 U.S.C. § 1951 (The Hobbs Anti-Racketeering Act) requires that a person must actually obtain property from another party. 537 U.S. at 404, 123 S. Ct. at 1065.

statement; and (3) certain evidence introduced by the government was untimely and inadmissible.

This Court rejected the defendants' evidentiary and prosecutorial misconduct arguments. However, we determined that because the defendants had not obtained any property during the commission of their offenses, an element of extortion had not been met pursuant to *Scheidler*. Accordingly, we vacated both defendants' convictions and sentences on counts 2 and 3 in full, and also their convictions and sentences on count 1, to the extent the conspiracy alleged in count 1 relied on extortion. *United States v. Ramos*, No. 02-16478, at 7 (11th Cir. Sept. 26, 2003).

We noted, however, that the defendants still had valid convictions for: (1) conspiracy to violate the laws of the United States by keeping migrant workers in involuntary servitude (count 1); and (2) harboring illegal aliens (count 4). We thus remanded for resentencing on these convictions.

C. Resentencing

On remand, the district court ordered revised PSIs for both defendants. After grouping the offenses, the PSIs determined that the count producing the highest offense level was count 1, the conspiracy to commit involuntary-servitude offense. The Guideline for that offense is U.S.S.G. § 2H4.1(a)(1), which sets the base offense level at 22.[2]

[2] The applicable Guideline for conspiracy, § 2X1.1, refers to the substantive offense. In this case, the substantive offense is involuntary servitude, in violation of 18 U.S.C. § 1584. The Guideline for a § 1584

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In addition, § 2H4.1(b)(4)(B) increases that base offense level if "any other felony offense" was committed during the involuntary-servitude offense and the offense level for that other felony offense is greater. Specifically, § 2H4.1(b)(4) provides:

> (4) *If any other felony offense was committed* during the commission of, or in connection with, the peonage or involuntary servitude offense, *increase to the greater of:*
>
> (A) 2 plus the offense level as determined above, or
>
> (B) *2 plus the offense level from the offense guideline applicable to that other offense,* but in no event greater than level 43.

U.S.S.G. §§ 2H4.1(b)(4)(A)-(B) (emphasis added). In addition to their involuntary-servitude offense, the defendants were convicted of another felony: harboring illegal aliens in violation of 8 U.S.C. § 1324. The PSI indicated that the offense level for this other felony – harboring illegal aliens – was higher and thus controlled the offense level for the involuntary-servitude offense.

While U.S.S.G. § 2L1.1 sets the base offense level at 12 for harboring illegal aliens, the PSI recommended a nine-level enhancement under § 2L1.1(b)(2)(C) because the defendants' harboring-illegal-aliens offense involved more than 100 aliens; a four-level enhancement under § 2L1.1(b)(4)(B) because the defendants brandished a

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offense is § 2H4.1(a)(1). All citations are to the 2002 version of the Guidelines.

firearm during the May 27, 2000 assault on Martinez; and a six-level enhancement under § 2L1.1(b)(6)(3) because Martinez sustained permanent bodily injury. Accordingly, the PSI recommended: (1) an offense level of 31 for the harboring-illegal-aliens offense (12+9+4+6); and (2) an offense level of 33 for the involuntary-servitude offense (two plus the offense level of 31 from the harboring-illegal-aliens offense). *See* U.S.S.G. § 2H4.1(b)(4)(B).

The PSI also recommended a two-level enhancement for Ramiro Ramos for obstruction of justice. Thus, Ramiro Ramos's total offense level was 35 and Juan Ramos's total offense level was 33. Both defendants had a criminal history category of I.

At resentencing, the district court adopted the Guidelines calculations in the PSI. Further, the district court accepted the government's argument that the trial evidence showed that both defendants were leaders of the organization and deserved leadership role enhancements. The four-level leadership-role enhancement resulted in a total offense level of 39 for Ramiro Ramos and 37 for Juan Ramos. Thus, Ramiro Ramos's Guidelines range was 262-327 months' imprisonment, and Juan Ramos's Guidelines range was 210-262 months' imprisonment.

Ultimately, the district court sentenced both defendants to only 60 months' imprisonment on the involuntary-servitude offense and 120 months' imprisonment on count 4 to run consecutively, for a total of 180 months' imprisonment.

The sentences were based on the statutory maximums for each offense.[3]

The defendants timely appealed.

II. DISCUSSION

A. Application of § 2H4.1(b)(4)(B)

The defendants' principal argument is that the district court incorrectly applied §§ 2H4.1(b)(4)(B) and 2L1.1 in sentencing them. The defendants do not challenge that the trial evidence showed that they assaulted and threatened Martinez on May 27, 2000 with firearms. Instead, the defendants primarily argue that the assault on Martinez, including the use of firearms, was not connected to their harboring-illegal-aliens offense and should not be used to enhance their sentences. They also argue that the district court erred in determining that the injury Martinez sustained during the assault was "permanent" for purposes of § 2L1.1(b)(6)(3), and that the defendants harbored more than 100 illegal aliens.[4]

During the sentencing hearing, the district court found that the trial evidence showed that the assault was part of the defendants' offenses. Further, the district court

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[3] The statutory maximum for the involuntary-servitude offense is 60 months' imprisonment. 18 U.S.C. § 371. The statutory maximum for the harboring-illegal-aliens offense is 120 months' imprisonment. 8 U.S.C. § 1324(a)(2).

[4] The defendants made these same objections at sentencing. During the sentencing hearing, the district court overruled the defendants' objections. This Court reviews the district court's application of the Guidelines *de novo* and its factual findings for clear error. *United States v. Grant*, 397 F.3d 1330, 1332 (11th Cir. 2005).

determined that the trial evidence showed that the defendants harbored more than 100 illegal aliens and that Martinez's injury was permanent. We recount some of the trial evidence.

As to the May 27, 2000 assault, the trial evidence indicated that the defendants approached vans owned by Martinez and threatened to kill Marcos Orozco, a van driver. The defendants also threatened Alejandro Benitez, another van driver. Further, the defendants repeatedly hit Martinez with a gun, kicked him until he lost consciousness, and accused him of "taking away" their "people." Moreover, the defendants vandalized the vans that Martinez used to transport migrant workers, and Ramiro Ramos threatened to kill Martinez.

The offenses that gave rise to the charges in counts 1 and 4 occurred from January 2000 to June 2001. The May 27, 2000 altercation with Martinez occurred during that time and the trial evidence showed that it was committed in order to induce Martinez to stop transporting migrant workers outside of their area because they felt Martinez's business threatened their efforts to harbor illegal aliens. We thus conclude that the district court did not clearly err in finding that the assault on Martinez was connected to defendants' harboring-illegal-aliens offense.

The district court also did not clearly err in finding that the defendants harbored substantially more than 100 aliens. The trial testimony of the Social Security Administration and Border Patrol agents was sufficient to support that fact-finding. Specifically, at trial, an agent with the Social Security Administration testified that based on the I-9 forms submitted by the defendants for the period from January 1, 2000 through June 30, 2001, only sixteen

of their approximately 680 workers had valid social security numbers. Further, an agent from the United States Border Patrol testified that the I-9 forms submitted by the defendants reflected that only ten of the workers had valid alien registration numbers, an eight-digit number assigned to individuals lawfully admitted to the United States for permanent residence.

Finally, at trial, Martinez also testified that as a result of the injuries received during the altercation, he sustained a scar from his hairline to the bridge of his nose and a permanent scar on his lip. The permanency of Martinez's scar is sufficient to classify his injury as a permanent or life-threatening bodily injury.[5] *See United States v. Torrealba,* 339 F.3d 1238, 1246 (11th Cir. 2003), *cert. denied,* 540 U.S. 1207, 124 S. Ct. 1481 (2004) ("[T]he plain language of application note 1[(g)] encompasses injuries that may not be terribly severe but are permanent, hence the disjunctive: 'permanent or life-threatening injuries.'" (internal quotation marks and citation omitted)).

Accordingly, the district court did not err in calculating the defendants' sentences under §§ 2H4.1(b)(4)(B) and 2L1.1.[6]

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[5] The Guidelines define permanent or life-threatening bodily injury as an "injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent." U.S.S.G. § 1B1.1 cmt. n.1(g).

[6] The entire briefing on appeal as to Juan Ramos was completed on November 1, 2004. On March 11, 2005, Juan Ramos filed a motion for leave to file a supplemental brief to raise constitutional issues about his sentencing enhancements pursuant to *United States v. Booker,* 543 U.S. ___, 125 S. Ct. 738 (2005). While Juan Ramos's initial brief on appeal

(Continued on following page)

B. Vindictive Sentencing

Relying on *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072 (1969), the defendants contend that the district court's decision to impose a harsher sentence than it did originally gives rise to a presumption that the court acted

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challenged the sufficiency of the evidence as to his enhancements and whether § 2H4.1(b)(4)(B) was an applicable guideline, it did not raise any constitutional issues about those enhancements or the Guidelines even though *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004) was decided on June 24, 2004, well prior to the filing of Juan Ramos's brief. Because Juan Ramos did not raise any constitutional issues in his initial brief, we deem those issues abandoned. *See United States v. Dockery*, 401 F.3d 1261, 1262 (11th Cir. 2005) (declining to consider *Booker* issue when defendant failed to timely raise it in his initial brief); *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) ("Defendant abandoned the [*Apprendi*] indictment issue by not raising the issue in his initial brief."); *see also United States v. Levy*, 379 F.3d 1241, 1242 (11th Cir. 2004), *petition for cert. filed*, March 1, 2005 (No. 04-8942) (declining to consider *Blakely* issue raised for the first time in petition for rehearing). Accordingly, we deny Juan Ramos's March 11, 2005 motion for leave to file a supplemental brief to raise new issues.

We also point out that the defendants did not raise any constitutional issues under the Sixth Amendment in the district court and thus at most we would review the defendants' *Booker* issues for plain error. *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005), *petition for cert. filed*, February 23, 2005 (73 U.S.L.W. 3531). Even if the defendants could show error that was plain, they would be unable to satisfy the third prong of plain-error review. As discussed above, the district court's fact-findings were not clearly erroneous and supported the defendants' enhancements. The *Booker* error is not the use of extra-verdict enhancements, but "the use of extra-verdict enhancements to reach a guidelines result that is binding on the sentencing judge. . . ." *Id.* at 1301. Nothing in the record indicates that the defendants' sentences would have been different under an advisory Guidelines scheme. In fact, the 60- and 120-month sentences were the result of the statutory maximums for their offenses, and those maximums were below even the low end of the applicable Guidelines ranges, which were 262-327 months' imprisonment for Ramiro Ramos and 210-262 months' imprisonment for Juan Ramos.

vindictively, and that the district court failed to articulate reasons for imposing the longer sentence that are sufficient to rebut that presumption, thus establishing a violation of their due process rights.[7] We disagree.

First, as determined above, at resentencing the district court properly determined the defendants' Guidelines calculations. In the original sentencing, when the probation office applied § 2H4.1, the Guideline for involuntary servitude, it incorrectly cross-referenced the Guideline applicable to extortion instead of the higher Guideline in § 2L1.1 for harboring illegal aliens. Although we are not excusing the incorrect calculations that were used at the first sentencing, we do not attribute the correct application of § 2H4.1 at resentencing to vindictiveness. *See United States v. Edwards,* 225 F.3d 991, 993 (8th Cir. 2000) ("[T]here is no indication of vindictiveness in resentencing a defendant to exactly the sentence that the defendant would have received but for the erroneous application of [the Guidelines]."); *United States v. Duso,* 42 F.3d 365, 369 (6th Cir. 1994) ("If the district judge errs in favor of the defendant, however, the defendant bears the risk that the

[7] In *Pearce,* the Supreme Court held that if a more severe sentence is imposed following appeal, the reasons for the harsher sentence must appear on the record and must be "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S. at 726, 89 S. Ct. at 2081. In *Alabama v. Smith,* 490 U.S. 794, 109 S. Ct. 2201 (1989), the Supreme Court clarified the *Pearce* doctrine by explaining that the presumption of vindictiveness applies only where there is a "reasonable likelihood" that the increase in the sentence is the product of actual vindictiveness, and if the presumption does not apply, the defendant must prove actual vindictiveness. *Smith* 490 U.S. at 799, 109 S. Ct. 2204-05.

error may be corrected against the defendant's favor [on resentencing]."). [8]

Further, the transcript of the resentencing hearing reflects that the district court carefully considered each of the parties' objections, detailed the basis for its calculations, and explained the reasons the new sentences were longer than the original sentences. *See United States v. Cox*, 299 F.3d 143, 149-50 (2d Cir. 2002) (finding no vindictiveness and stating "the district court throughout these proceedings carefully notified the parties of its concerns, considered their arguments and submissions, and deliberately laid out its rationale").

C. Entitlement to Lesser Sentences

The defendants also argue that they were entitled to a lesser sentence on remand because two of their convictions were vacated. We disagree. It is well-settled that a defendant is not entitled to a shorter sentence just because one

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[8] At resentencing, the district court also correctly applied the obstruction-of-justice and leadership-role enhancements. The obstruction-of-justice and leadership-role enhancements were the result of the government's timely objections to the PSI upon resentencing. The government attempted to make those same objections at the original sentencing; however, they were untimely. The district court was permitted to consider the objections on remand because they were timely and because the sentencing process had started anew. *See United States v. Stinson*, 97 F.3d 466, 469 (11th Cir. 1996) ("[W]hen a criminal sentence is vacated, it becomes void in its entirety; the sentence – including any enhancements – has been wholly nullified and the slate wiped clean." (internal quotation marks and citation omitted)). Further, there is no evidence in the record that these enhancements were the result of vindictiveness. In any event, as explained in footnote 6, the defendants received lower sentences than the Guidelines range for their offenses due to the applicable statutory maximums.

or more counts of conviction are dismissed on appeal and he is resentenced on the remaining counts. *See United States v. Warda*, 285 F.3d 573, 580-81 (7th Cir. 2002); *see also United States v. Stinson*, 97 F.3d 466, 469 (11th Cir. 1996).

III. CONCLUSION

For the above reasons, we affirm the defendants' sentences.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11152-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAMIRO RAMOS,
a.k.a. "EL CHAGAN" or "EL DIABLO",
d.b.a. "R&A HARVESTING",

Defendant-Appellant.

No. 04-12923-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN RAMOS,
a.k.a. NENO,
a.k.a. NINO,
d.b.a. R&A HARVESTING,
d.b.a. JUAN RAMOS HARVESTING,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

(Filed Feb. 14, 2005)

ORDER:

Appellant Ramiro Ramos' motion to file a supplemental brief is DENIED. *See U.S. v. Hembree,* 381 F.3d 1109 (11th Cir. 2004); *U.S. v. Curtis,* 380 F.3d 1308 (11th Cir. 2004); *U.S. v. Levy,* 377 F.3d 259 (11th Cir. 2004).

Appellee's motion for a sixty-day extension of time to respond to Appellants motion is DENIED AS MOOT.

/s/ Susan H. Black
UNITED STATES
CIRCUIT JUDGE

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-16478
Non-Argument Calendar

D.C. Docket No. 01-14019-CR-KMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAMIRO RAMOS,
a.k.a. El Chagan, etc.,
d.b.a. R&A Harvesting,
JOSE RAMOS,
JUAN RAMOS,
a.k.a. Neno, etc.,
d.b.a. R&A Harvesting, etc.,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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(September 26, 2003)

Before CARNES, HULL and WILSON, Circuit Judges.

PER CURIAM:

After a jury trial, brothers Ramiro and Juan Ramos appeal their convictions for conspiracy to violate the laws of the United States by keeping migrant workers in

involuntary servitude, interfering with commerce through extortion, and harboring illegal aliens, in violation of 18 U.S.C. §§ 371 and 1951 (Count 1); interference with commerce through extortion by threats and violence, in violation of 18 U.S.C. § 1951 (Count 2); using a firearm in connection to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 3); and harboring illegal aliens, in violation of 8 U.S.C. § 1324(a) (Count 4).

The same jury also convicted Ramiro's and Juan's cousin, Jose Ramos, and Jose Ramos appeals his convictions for conspiracy to violate the laws of the United States by interfering with commerce through extortion, in violation of 18 U.S.C. §§ 371 and 1951 (Count 1); interference with commerce through extortion by threats and violence, in violation of 18 U.S.C. § 1951 (Count 2); using a firearm in connection to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 3). After review, we vacate in part and affirm in part as detailed herein.

I. BACKGROUND

The charges in this case arose from two distinct allegations. First, the government alleged that Jose Martinez-Cervantes was the owner of a transportation service for migrant farm workers and that Defendants Ramiro, Juan, and Jose Ramos assaulted Martinez-Cervantes with the intent of inducing Martinez-Cervantes not to transport migrant farm workers out of the Lake Placid, Florida, area. Second, the government alleged that Defendants Ramiro, Juan, and Jose Ramos used threats to prevent migrant workers from leaving their employment, housed the migrant workers in abysmal conditions, kept the migrant workers under surveillance, and kept the

migrant workers in debt for the duration of the harvesting season.

As for the assault of Martinez-Cervantes, Alejandro Benitez testified that he was an employee of Martinez-Cervantes. Benitez described Martinez-Cervantes's business as a van service that picks up migrant workers and brings them to other states at the end of the harvesting season.

Benitez then described the Defendants' assault of Martinez-Cervantes. Benitez testified that he saw people beating one of the drivers in the parking lot and that two of the attackers had guns. He further testified that the Defendants hit Martinez-Cervantes with a gun and kicked him. Benitez identified all three Defendants as the attackers.

Martinez-Cervantes also testified that the three Defendants assaulted him and that the three Defendants had accused him of taking away their people. Martinez-Cervantes further testified that Ramiro Ramos threatened to kill him, that all the windows on his vans were broken, and that he had to go to the hospital and get stitches after the assault.

Three migrant workers also testified at the trial. Adalberto Martinez-Gonzalez testified that he was born in Mexico and traveled to the United States to look for work. Martinez-Gonzalez stated that he arrived in Lake Placid, Florida, and was taken to the La Pinta housing provided by Ramiro and Juan Ramos. He testified that the La Pinita house had two floors, there were bunkbeds in the rooms, six people lived on his floor, and there were many people living in the house. Juan Castro testified that he also traveled from Mexico to work and was taken to the La

Pinita house. He testified that he slept on a mattress on the floor in a room with five other people. Jesus Morales also testified that he was a migrant worker from Mexico and that he stayed at the La Pinita house with the other workers. Finally, the owner of the La Pinita house, Dale Bury, testified that he rented the space to Defendants Ramiro and Juan Ramos to house their migrant workers. Bury testified that he was familiar with the way the housing looked inside and that he would not have lived there himself.

II. DISCUSSION

As mentioned above, Ramiro and Juan Ramos's conspiracy convictions (Count One) were based on three unlawful purposes: 1) to hold migrant workers in involuntary servitude; 2) to engage in extortion to affect commerce; and (3) to harbor illegal aliens. Jose Ramos, however, was convicted only of conspiracy based on this one unlawful offense; engaging in extortion to affect commerce (Count One). All three Defendants were convicted of the substantive offense of extortion, in violation of 18 U.S.C. § 1951 (Count Two), and possession of a firearm in connection with the extortion offense, in violation of 18 U.S.C. § 924(c) (Count Three). Finally, Defendants Ramiro and Juan Ramos were convicted of harboring illegal aliens, in violation of 8 U.S.C. § 1324(a) (Count Four).

A. Scheidler v. National Organization for Women, Inc.

We first address the validity of the three Defendants' convictions in light of the United States Supreme Court's decision in *Scheidler v. National Organization for Women,*

Inc., 537 U.S. 393, 123 S. Ct. 1057 (2003) regarding The Hobbs Anti-Racketeering Act ("Hobbs Act"), 18 U.S.C. § 1951. The government's brief concedes that *Scheidler* requires the vacation of: 1) Jose Ramos's convictions and sentences in full; 2) Ramiro and Juan Ramos's convictions and sentences on Counts Two and Three in full; and 3) Ramiro and Juan Ramos's convictions and sentences on Count One, to the extent the conspiracy alleged in Count One relied on extortion. In fact, Jose Ramos has been released pending the outcome of this case.

The Hobbs Act provides both criminal and civil penalties against anyone who interferes with commerce by robbery or extortion or attempts or conspires to interfere with commerce by robbery or extortion. 18 U.S.C. § 1951(a). As used in the Hobbs Act, "extortion" means "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right" 18 U.S.C. § 1951(b)(2).

The litigation leading to the *Scheidler* decision arose when the National Organization for Women ("NOW") sued a number of anti-abortion groups for racketeering and conspiracy to shut down abortion clinics. *Scheidler,* 537 U.S. ___, 123 S. Ct. at 1062. The claims that NOW brought included an extortion claim, in violation of 18 U.S.C. § 1951. *Id.* An issue arose as to whether NOW had satisfied the elements of extortion, specifically as to whether the anti-abortion groups had obtained property. *Id.* at ___, 123 S. Ct. at 1062-63. NOW argued that the anti-abortion groups obtained property through threats, force, and violence and that the right of women to seek medical care and the rights of medical staff to provide that care constituted property. *Id.* at ___, 123 S. Ct. at 1063.

In *Scheidler,* the Supreme Court addressed the definition of extortion under § 1951 and explained that extortion under 18 U.S.C. § 1951, requires "that a person must 'obtain' property from another party." *Id.* at ___, 123 S. Ct. at 1065. "[I]nterfering with or depriving someone of property" does not satisfy the definition of extortion under § 1951. *Id.* at ___, 123 S. Ct. at 1065-66 (holding that petitioners' interference and disruption, even where it "deprived respondents of their ability to exercise their property rights . . . did not constitute extortion because petitioners did not 'obtain' respondents' property").

In the instant case, Counts Two and Three of the indictment and the related conspiracy charge in Count One were supported by the fact that Defendants Jose, Juan, and Ramiro Ramos threatened and physically assaulted Jose Martinez-Cervantes, vandalized the vans that Martinez-Cervantes used to transport migrant workers, and warned him not to transport any more migrant workers away from the Lake Placid area. Based on these facts, none of the Defendants, however, obtained any property from Martinez-Cervantes and, therefore, a necessary element of extortion under *Scheidler* was not present. Accordingly, this Court agrees with the government and vacates the Defendants' convictions on Counts Two and Three and the portions of Count One which rely on the unlawful purpose of extortion.

Based on *Scheidler,* Defendant Jose Ramos's convictions and sentences are vacated in full. Therefore, we do not address any other issues raised by him. However, Defendants Ramiro and Juan Ramos still have valid convictions for: 1) conspiracy to violate the laws of the United States by keeping migrant workers in involuntary servitude and harboring illegal aliens (Count One); and 2)

harboring illegal aliens (Count 4). Therefore, we address Defendants Ramiro and Juan Ramos's remaining arguments to the extent they implicate these convictions.[1]

B. The Prosecutor's Opening Statement

On appeal, Ramiro and Juan Ramos assert that the government engaged in prosecutorial misconduct during its opening statement. Specifically, Defendants argue that the prosecutor made two inappropriate comments to the jury during opening statements, We disagree, and conclude that the government did not make any improper comments.[2]

In the government's opening statement, the prosecutor explained that the case concerned the Defendants' use of threats and violence to retain a work force for their fruit harvesting business, which involved providing migrant workers for citrus groves. The prosecution claimed that the migrant workers would testify that the Defendants held them in involuntary servitude and harbored them in a house controlled by the Defendants. The prosecution claimed that the workers would testify that they were told they owed the Defendants $1,000 each for transportation

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[1] Specifically, this means that we do not address Defendants Ramiro and Juan Ramos's argument regarding an allegedly improper identification of the Defendants as the persons who attacked Martinez-Cervantes.

[2] "Prosecutorial misconduct is a basis for reversal only if, in the context of the entire trial and in light of any curative instruction, the misconduct may have prejudiced the substantial rights of the accused." *United States v. Chirinos*, 112 F.3d 1089, 1098 (11th Cir. 1997) (internal quotations omitted). For reversal, the "misconduct [must be] so pronounced and persistent as to permeate the entire atmosphere of the trial." *Id.* (internal quotations omitted).

costs and that they would be beaten if they left without paying off the debt The prosecution also stated that one worker would testify that he worked for Ramiro Ramos and was taken to a house in Lake Placid, Florida, that was filthy and overcrowded, and he was forced to pay $30 a week to live there. The prosecution then said that "you would not want to live there yourself." This is the first statement about which Defendants object.

The prosecution also stated that the Defendants used threats and violence to terrorize a van driver who was transporting migrant workers. The government claimed that the jury would hear about an attack on Martinez-Cervantes and that the police found a gun on the Defendants when they arrived at the scene. The prosecution referred to the attack on Martinez-Cervantes as the first part of the case. The prosecution then stated that the

> second part of this case takes place or starts in a place far away from Fort Pierce, Florida. It started in Mexico. It started in Mexico, and you will hear from three or four of these migrant workers. There are hundreds of them, but you will hear from three or four.

Defendants take issue with the prosecutor's statement that there were hundreds of affected migrant workers and that the migrant workers were from Mexico.

This Court applies a two-part test to determine if reversal is appropriate based on prosecutorial misconduct during opening statements. *United States v. Obregon,* 893 F.2d 1307, 1310 (11th Cir. 1990). This Court first decides "whether the challenged statements were improper." *Id.* In this regard, we have previously concluded that remarks are not improper where the prosecutor had a reasonable

belief that the evidence was admissible. *United States v. Chirinos,* 112 F.3d 1089, 1098 (11th Cir. 1997).[3]

Analyzing the statements at issue under *Obregon,* the government's remarks here were not improper because they were fully supported by evidence introduced at trial. First, three migrant workers testified that they came from Mexico and worked for Ramiro and Juan Ramos. Additionally, Yolanda Celaya from the payroll service at Ramiro and Juan Ramos's company testified that 70 percent of the workers had invalid social security numbers and she did not know of any American citizens working in the fields. Again, both Celaya and an employee of Consolidated Citrus, the company that hired the Ramos's workers, agreed that Ramiro and Juan Ramos had hundreds of workers. Furthermore, a labor specialist from the United States Department of Labor testified that it was common knowledge that most migrant workers were of Mexican origin. Finally, the Defendants themselves mentioned in opening statements that most of their workers were Mexican.

As for the migrant workers' living conditions, the government presented the testimony of the workers and the owner of the housing complex regarding living conditions

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[3] If the statements were improper, this Court then decides "whether they prejudicially affected the appellants' substantial rights." *Obregon,* 893 F.2d at 1310. Even where statements are improper, the misconduct only requires reversal where the statements "undermined the fairness of the trial and contributed to a miscarriage of justice." *Id.* (internal quotations omitted). This Court has held that even where remarks were improper, reversal was not required where the district court gave a cautionary instruction, the prosecutor did not repeat the remarks, and there was independent evidence that established guilt. *Id.* at 1311.

and supported the evidence with a video recording of the premises. Finally, Juan Ramos agreed, in his opening statement and closing argument, that the La Pinita housing was not a nice place to live.

Because the statements regarding the number of workers, the nationality of the workers, and the housing conditions were supported by evidence introduced at trial, they were not improper and, therefore, there is no need to reach the prejudice issue. *See Obregon*, 893 F.2d at 1311; *Chirinos*, 112 F.3d at 1098.[4]

C. Admission of Evidence

Before the trial commenced, the parties engaged in a number of disputes regarding discovery. Relevant to this appeal, the Defendants argue that certain evidence was untimely and inadmissible. Specifically, the Defendants object to the introduction of a summary of the contents of Employment Eligibility Verification Forms ("I-9 forms") that suggested that the Defendants falsified the names and social security numbers of the migrant workers. The I-9 forms and accompanying summary indicated that Ramiro and Juan Ramos had knowledge that 70 percent of their employees, between 1997 and 2001, had social security numbers that did not match the records of the SSA. Because the I-9 forms and the summary of the I-9

[4] To the extent any prejudice existed, the district court solved any issues regarding prejudice by properly instructing the jury to base its decision on the evidence and testimony and explained that attorney statements were not evidence. *See Obregon*, 893 F.2d at 1311.

forms were clearly relevant evidence, the district court properly admitted them.[5]

"Relevant evidence" is that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. . . . " Fed. R. Evid. 401. "All relevant evidence is admissible, except as otherwise provided." Fed. R. Evid. 402.

This Court has held that "evidence of other crimes is generally inadmissible as extrinsic evidence." *United States v. Smith,* 122 F.3d 1355, 1359 (11th Cir. 1997). Evidence that is "inextricably intertwined with the evidence of the charged offense," however, is not extrinsic. *Id.* (internal quotations omitted). "Furthermore, Rule 404(b) does not apply where the evidence concerns the context, motive, and set-up of the crime and is linked in time and circumstances with the charged crime, or forms an integral part of an account of the crime or is necessary to complete the story of the crime for the jury." *Id.* (internal quotations omitted).[6]

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[5] The Defendants also claim that the late disclosure prevented them from verifying the contents of the documents, contacting the names on the forms, or effectively cross-examining the government's witnesses. However, to date, the Defendants have yet to identify one witness they would have called or a different line of questioning they would have pursued. Furthermore, neither Ramiro or Juan Ramos accepted the district court's offer to move for a continuance so that they could study the materials at issue.

[6] Rule 404(b) of the Federal Rules of Evidence provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

(Continued on following page)

In the instant case, the I-9 forms and the summary of their contents were relevant to the case because the documents made it more probable that Ramiro and Juan Ramos knew that the migrant workers who they employed were undocumented aliens. Fed. R. Evid. 401; 8 U.S.C. § 1324(a)(1)(A)(iii). Furthermore, Ramiro and Juan Ramos were charged with harboring illegal aliens. Evidence that the aliens they employed were undocumented and evidence that they falsified SSA documents in order to continue to employ their workforce is a necessary part of the set-up of the crime and inextricably intertwined with the evidence of the offense. Because the evidence was relevant to an element of the offense and was not extrinsic evidence subject to Rule 404(b), the district court did not abuse its discretion by admitting the evidence.[7] *See Smith*, 122 F.3d at 1359.

> preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Fed. R. Evid. 404(b).

[7] The Defendants' arguments regarding the late disclosure of numerous documents and the admission of the government's summary of the information contained in the I-9 forms are without merit and are not discussed further. Further, we do not reach any issues raised in the Defendants' reply brief, as it was struck by this Court on June 13, 2003. Finally, on March 24, 2003, this Court ordered that all Defendants must file a consolidated brief. Although Ramiro and Juan Ramos originally filed a brief arguing that the district court imposed an excessive fine of $15,000, the excessive fine issue was not raised in the Defendants' consolidated brief filed on April 29, 2003. Although we are not required to reach this issue, we do so because we easily conclude it lacks merit.

III. CONCLUSION

For all the above reasons, this Court: 1) vacates Jose Ramos's convictions and sentence in full; 2) vacates Ramiro Ramos's and Juan Ramos's convictions and sentences as they relate to Counts Two and Three in full; and 3) vacates Ramiro Ramos's and Juan Ramos's convictions and sentences as to Count One to the extent that Count One rests on the commission of the offenses listed in Counts Two and Three. In all other respects, we affirm Ramiro Ramos's and Juan Ramos's convictions with respect to Counts One and Four. Finally, this case is remanded to the district court for re-sentencing of Defendants Ramiro and Juan Ramos for their convictions on Counts One and Four.

VACATED in part, AFFIRMED in part, and REMANDED for re-sentencing.

By: [Illegible]
Deputy Clerk
Atlanta, Georgia

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
U.S.R.E. 80
FIRST SENTENCING on Counts 1, 2, 3 & 4
(November 20, 2002)

A. ***CALCULATION***:

1. **COUNTS 1, 2 & 4**

3D1.2(c), 3D1.3(b)	Counts grouped & guideline yielding highest offense level applied
2H4.1(a)(1)	Involuntary servitude (Count 1) yields highest offense level
2H4.1(b)(4)(B)	Cross-reference to 2B3.2, since extortion, Count 2 committed "during * * * or in connection with" involuntary servitude.

18 (base offense level for extortion pursuant to 2B3.2)
+6 (permanent or life-threatening injury pursuant to 2B3.2(b)(4)(C))
+2 (count 2 committed in connection with involuntary servitude pursuant to 2H4.1(b)(4)(B))

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26 = Total offense level (guideline range of 63-78 months)

2. **COUNT 3**

18 U.S.C. 924(c)	Mandatory minimum of 84 months because Defendant brandished firearm.

B. ***SENTENCE IMPOSED***:

147 months – 63 months on counts 1, 2, & 4;*
84 months on count 3

* Court refused to consider a 4 level enhancement for Aggravating Role pursuant to 3B1.1(a).

RESENTENCING on Counts 1 & 4 (May 5, 2004)

A. ***CALCULATION***:

1. **COUNTS 1 & 4**

3D1.2(b), 3D1.3(b)	Counts grouped & guideline yielding highest offense level applied
2H4.1(a)(1)	Involuntary servitude (Count 1) yields highest offense level
2H4.1(b)(4)(B)	Cross-reference to 2L1.1, since harboring (Count 4) committed "during * * * or in connection with" involuntary servitude.

12 (base offense level for harboring pursuant to 2L1.1)
+9 (100 or more aliens pursuant to 2L1.1(b)(2)(C))
+4 (brandishing firearm pursuant to 2L1.1(b)(4)(B))
+6 (permanent or life-threatening injury pursuant to 2L1.1(b)(6)(3))
+2 (count 4 committed in connection with involuntary servitude pursuant to 2H4.1(b)(4)(B))
+4 (aggravating role as leader pursuant to 3B1.1(a))

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37 = Total offense level (guideline range of 210-262 months)

B. ***SENTENCE IMPOSED***:

Statutory maximum of **180** months – 60 months on count 1; 120 months on count 4

U.S.R.E. 80